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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Manuel Luis Medina,

10 Plaintiff,

11 vs.

12 Joseph M. Arpaio, et al.,

13 Defendants.

14

No. CV 13-0572-PHX-DGC (JFM)

15 **ORDER**

16 Plaintiff Manuel Luis Medina, who is now confined in the Arizona State Prison
17 Complex, Buckley-Blue Unit, in Buckeye, Arizona, filed a *pro se* civil rights Complaint
18 under 42 U.S.C. § 1983, which the Court dismissed for failure to state a claim with leave
19 to amend.¹ (Doc. 1, 8.) Plaintiff has filed a First Amended Complaint. (Doc. 14.) The
20 Court will dismiss the First Amended Complaint for failure to state a claim with leave to
21 amend.

22 **I. Statutory Screening of Prisoner Complaints**

23 The Court is required to screen complaints brought by prisoners seeking relief
24 against a governmental entity or an officer or an employee of a governmental entity. 28
25 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
26 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
27 which relief may be granted, or that seek monetary relief from a defendant who is

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¹ Plaintiff was incarcerated in Maricopa County's Fourth Avenue Jail when he commenced this case.

1 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

2 A pleading must contain a “short and plain statement of the claim *showing* that the
 3 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
 4 does not demand detailed factual allegations, “it demands more than an unadorned, the-
 5 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 6 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 7 conclusory statements, do not suffice.” *Id.*

8 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 9 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 10 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
 11 content that allows the court to draw the reasonable inference that the defendant is liable
 12 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
 13 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
 14 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
 15 specific factual allegations may be consistent with a constitutional claim, a court must
 16 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
 17 at 681.

18 But as the United States Court of Appeals for the Ninth Circuit has instructed,
 19 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
 20 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
 21 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

22 If the Court determines that a pleading could be cured by the allegation of other
 23 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
 24 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The
 25 Court will dismiss Plaintiff’s First Amended Complaint for failure to state a claim, but
 26 because it may possibly be amended to state a claim, the Court will dismiss it with leave
 27 to amend.

1 **II. First Amended Complaint**

2 Plaintiff alleges two counts for threat to safety and denial of due process in
 3 connection with disciplinary proceedings. Plaintiff sues Maricopa County Sheriff Joseph
 4 M. Arpaio and the following current or former employees of the Sheriff's Office:
 5 Disciplinary Facility Commander A4038; Rick Bailey, head of classification personnel;
 6 and Detention Officer Burke. Plaintiff seeks injunctive, compensatory, and punitive
 7 relief.

8 Portions of Plaintiff's First Amended Complaint, particularly page 3, are only
 9 partially legible. Omitting the illegible portions, Plaintiff alleges the following facts,
 10 which the Court summarizes chronologically: Plaintiff was booked into the Fourth
 11 Avenue Jail on March 2, 2012. (Doc. 14 at 3B.) On January 17, 2013, Plaintiff signed a
 12 waiver to be removed from General Population (GP) and to be placed into Protective
 13 Segregation (PS) after Plaintiff was informed by jail intelligence staff that a death threat
 14 had been made against him by known Mexican Mafia gang-members and upon the
 15 recommendation of jail intelligence staff.² However, after further review, jail officials
 16 informed Plaintiff that he was not eligible for placement in Administrative Segregation
 17 (AS) at the Lower Buckeye Jail (LBJ), where PS inmates were typically held.³ The
 18 Fourth Avenue Jail, where Plaintiff was being held, did not have a PS pod. Therefore,
 19 Classification Officer Bailey raised Plaintiff's classification to Close Custody (CC) and
 20 Plaintiff was placed in a CC pod, specifically, pod 4F100. Each CC inmate was held in a
 21 one-person cell for 23 hours a day with an hour out of his cell alone for showers and
 22 other tasks; each CC inmate was supposed to be kept separate from other inmates,
 23 including other CC inmates. According to Plaintiff, most CC inmates were so designated
 24 because of disciplinary infractions that posed risks to other inmates and staff. In addition,
 25 at times relevant to Plaintiff's claims, inmates from the Arizona Department of

27 ² Plaintiff alleges that the threats were caught on a recording. (Doc. 14 at 3B.)

28 ³ Plaintiff subsequently learned that he was not eligible to go to LBJ because of
 his history.

1 Corrections (ADC) were also held in CC pods. Plaintiff contends that Defendants knew
 2 that placing a PS inmate in a CC pod could pose a risk to the PS inmate if the inmates
 3 were allowed out of their cells at the same time.

4 At some point prior to January 31, 2013, inmate Anthony German was in Pod
 5 4F200, which was identical to Plaintiff's pod 4F100. An officer mistakenly
 6 simultaneously opened all of the cell doors in the pod, which enabled some of the CC
 7 inmates to assault German resulting in a severe spinal injury. On or about January 31,
 8 2013, an officer, apparently Burke, mistakenly simultaneously opened all of the cell
 9 doors in Pod 4F100, although apparently no assaults occurred because of the error.

10 On February 3, 2013, ADC Inmate Cruz, who was a member of a Security Threat
 11 Group (STG), specifically the Mexican Mafia, arrived at the jail and was housed in
 12 Plaintiff's pod, 4F100. (*Id.* at 3C.) Another inmate, Inmate Lechuga, who was also
 13 affiliated with the Mexican Mafia, was also housed in Plaintiff's pod. (*Id.* at 3C-3D.)

14 On February 11, 2013, Burke again erroneously simultaneously opened all the cell
 15 doors in Pod 4F100 and immediately turned his attention away from Pod 4F100 to look at
 16 a computer. Plaintiff and other inmates in the pod began leaving their cells without
 17 realizing that all of the cells had been simultaneously opened. As they realized the error,
 18 some of the inmates attempted to alert Burke so that Burke would close the cell doors,
 19 but Burke, who was looking in another direction, did not see them. As this was
 20 occurring, Inmate Cruz, who had been in cell 4F22, began assaulting another inmate.
 21 Inmate Lechuga, who was two doors down from Plaintiff's cell, joined in the assault of
 22 that inmate. Lechuga then saw Plaintiff. Lechuga raised his hand to attack Plaintiff, but
 23 Plaintiff "defend[ed]" himself and prevented Lechuga from pushing Plaintiff back into
 24 his cell where Plaintiff might have been trapped with Lechuga. (*Id.* at 3A.) At about this
 25 point, Burke saw what was happening in the pod and summoned back-up. Two or three
 26 minutes later, back-up officers arrived in force and used tasers to stop Cruz. Other
 27 officers came "running up the steps to subdue the remaining inmates, [and] inmate
 28 Lechuga was ordered to the [ground] as he did comply [sic]." (*Id.*) Plaintiff waited by

1 his cell for the door to be re-opened.⁴ Plaintiff suffered injuries to his left shoulder, lower
 2 back, and face as well as post-traumatic stress disorder (PTSD). In response to
 3 grievances, Sergeant Mank told inmates that there was nothing that could be done about
 4 housing PS inmates in CC pods because there was no room to house PS inmates
 5 separately in the Fourth Avenue Jail. Plaintiff was apparently issued a disciplinary
 6 charge. Facility Commander A4038, who was in charge of disciplinary appeals, found
 7 Plaintiff guilty of fighting, although he acknowledged that the doors were not supposed to
 8 have been opened simultaneously. (*Id.* at 3E-3F.)

9 Plaintiff contends that Burke knew of the risk of inmate assaults if all cells in the
 10 pod were simultaneously opened, based on prior assaults in such circumstances, and had
 11 been trained to open cell doors properly. According to Plaintiff, there are “a lot of
 12 intricate buttons to push to operate each door correctly and prevent assaults, deaths, and
 13 other incidents from occurring,” about which officers receive extensive training. (*Id.*)
 14 Plaintiff contends that Classification Officer Bailey knew that housing PS inmates in a
 15 CC pod could pose a serious risk of assault or injury to a PS inmate by CC inmates, if an
 16 opportunity arose. Plaintiff further contends that Bailey knew that PS inmates, such as
 17 German, had previously been assaulted by CC inmates when inadvertently allowed out of
 18 their cells at the same time as PS inmates. According to Plaintiff, Bailey allowed “high
 19 Close Custody inmates to be housed amongst [PS] inmates which created and still is a
 20 high risk of housing [PS] inmates with [CC] inmates[.]” (*Id.* at 3D.)

21 Plaintiff contends that Arpaio is chief custodian and is responsible for providing
 22 safe conditions. Plaintiff contends that Facility Commander A4038 acknowledged that
 23 the doors should not have been opened simultaneously and knew of the risks to inmates
 24 when such occurrences happen, but failed to prevent the February 11, 2013 incident.

25 Plaintiff also asserts that he was subjected to the type of confinement ordinarily
 26 imposed for inmates being punished for disciplinary infractions, and that his placement in
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28 ⁴ Plaintiff does not make clear when his cell door was closed, but apparently
 sometime after he avoided being pushed into his cell by Lechuga.

1 a CC pod, rather than a PS pod, resulted in restrictions of privileges afforded other PS
 2 and GP inmates. Plaintiff sought placement in a PS pod, but instead was placed in a CC
 3 pod because the Fourth Avenue Jail lacked a PS pod. Bailey increased Plaintiff's
 4 classification to CC, which resulted in Plaintiff being locked down 23 hours a day, celled
 5 alone, and denied privileges afforded to other PS and GP inmates. He contends that
 6 housing him in a CC pod with inmates who were being held there for disciplinary
 7 infractions amounted to punishment, where Plaintiff remained in the CC pod for six
 8 months. Plaintiff contends that he was denied due process before being placed in
 9 allegedly punitive conditions in the CC pod.

10 **III. Failure to State a Claim**

11 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
 12 conduct about which he complains was committed by a person acting under the color of
 13 state law and (2) the conduct deprived him of a federal constitutional or statutory right.
 14 *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). Negligence is not sufficient to
 15 state a claim under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). In
 16 addition, a plaintiff must allege that he suffered a specific injury as a result of the conduct
 17 of a particular defendant and he must allege an affirmative link between the injury and
 18 the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

19 **A. Arpaio and Facility Commander A4038**

20 Plaintiff seeks relief against Sheriff Arpaio and Facility Commander A4038.
 21 While each may be sued under § 1983, Plaintiff fails to state a claim against either.

22 To state a claim against a defendant, “[a] plaintiff must allege facts, not simply
 23 conclusions [to] show that an individual was personally involved in the deprivation of his
 24 civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). For an
 25 individual to be liable in his official capacity, a plaintiff must allege that the official acted
 26 as a result of a policy, practice, or custom. *See Cortez v. County of Los Angeles*, 294 F.3d
 27 1186, 1188 (9th Cir. 2001). Further, there is no *respondeat superior* liability under
 28 §1983, so a defendant's position as the supervisor of someone who allegedly violated a

1 plaintiff's constitutional rights does not make him liable. *Monell v. Dep't of Soc. Servs.*,
 2 436 U.S. 658, 691 (1978); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A
 3 supervisor in his individual capacity "is only liable for constitutional violations of his
 4 subordinates if the supervisor participated in or directed the violations, or knew of the
 5 violations and failed to act to prevent them." *Taylor*, 880 F.2d at 1045. In addition,
 6 where a defendant's only involvement in allegedly unconstitutional conduct is the denial
 7 of administrative grievances, the failure to intervene on a prisoner's behalf to remedy the
 8 alleged unconstitutional behavior does not amount to active unconstitutional behavior for
 9 purposes of § 1983. See *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); accord
 10 *Proctor v. Applegate*, 661 F.Supp.2d 743, 765 (W.D. Mich. 2009); *Stocker v. Warden*,
 11 No. 1:07-CV-00589, 2009 WL 981323, at *10 (E.D. Cal. Apr. 13, 2009); *Mintun v.*
 12 *Blades*, No. CV-06-139, 2008 WL 711636, at *7 (D. Idaho Mar. 14, 2008); see also
 13 *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006) (a plaintiff must allege
 14 that a supervisor defendant did more than play a passive role in an alleged violation or
 15 mere tacit approval thereof; a plaintiff must allege that the supervisor defendant somehow
 16 encouraged or condoned the actions of their subordinates).

17 Plaintiff predicates liability against Arpaio based solely on *respondeat superior*.
 18 As discussed above, that is not a basis for liability under § 1983. Plaintiff predicates
 19 liability against Facility Commander A4038 based on the denial of Plaintiff's disciplinary
 20 appeal. Plaintiff fails to allege facts to support that Arpaio directly violated his
 21 constitutional rights or facts to support that Plaintiff's constitutional rights were violated
 22 pursuant to a policy, practice, or custom that was promulgated, endorsed, or condoned by
 23 Arpaio. As noted above, the denial of an appeal, absent more, is not sufficient to state a
 24 claim against A4038 and Plaintiff does not otherwise allege that his constitutional rights
 25 were violated pursuant to a policy, practice, or custom promulgated, endorsed, or
 26 condoned by Facility Commander A4038. For the above reasons, Plaintiff fails to state a
 27 claim against Arpaio or Facility Commander A4038 and they will be dismissed.

28 ///

B. Count I

2 Plaintiff designates Count I as a claim for threat to safety. To state a claim under
3 § 1983 for failure to protect or threats to safety, an inmate must allege facts to show that
4 he was incarcerated under conditions posing a substantial risk of harm and that jail
5 officials were “deliberately indifferent” to those risks. *Farmer v. Brennan*, 511 U.S. 825,
6 832-33 (1994). To adequately allege deliberate indifference, a plaintiff must allege facts
7 to support that a defendant knew of, but disregarded, an excessive risk to inmate safety.
8 *Id.* at 837. That is, “the official must both [have been] aware of facts from which the
9 inference could be drawn that a substantial risk of serious harm exist[ed], and he must
10 also [have] draw[n] the inference.” *Id.*

11 Plaintiff appears to contend that Bailey's classification of him to CC, rather than
12 PS, posed a substantial threat to his safety where CC inmates sometimes were
13 inadvertently simultaneously released from their cells. Plaintiff also appears to contend
14 that the simultaneous opening of cell doors in CC pods posed a threat to his safety.
15 Plaintiff describes three instances when CC pod doors were opened inadvertently. In one
16 instance, Inmate German was allegedly severely injured. In the second, no inmate was
17 injured. In the third, Inmate Lechuga allegedly assaulted Plaintiff. Plaintiff has not
18 alleged facts to show that the risks of simultaneous, inadvertent opening of CC cell doors
19 posed a *substantial* risk to Plaintiff's safety. While Plaintiff cites three occurrences
20 during January and February 2013, Plaintiff does not allege *any* further occurrences
21 during the six months that remained in CC at the Jail.

22 Even if Plaintiff sufficiently alleged facts to support a *substantial* threat to his
23 safety, Plaintiff has not alleged facts to support that Bailey or Burke acted with deliberate
24 indifference to that risk. Plaintiff has not alleged that Burke's opening of CC cell doors
25 on February 11, 2013, or on any other occasion, was anything but inadvertent. Moreover,
26 Plaintiff alleges no further occurrences after the February 11, 2013 incident.

27 Plaintiff also has failed to allege facts showing that Bailey's classification of
28 Plaintiff to CC posed a substantial threat to his safety. For example, Plaintiff does not

1 contend that he would have been safer in GP, and Plaintiff's preference to be held in PS
 2 does not override jail officials' responsibility to protect other PS inmates. Accordingly,
 3 Plaintiff fails to state a claim for threat to safety in Count I and it will be dismissed.

4 **C. Count II**

5 Plaintiff designates Count II as a claim for denial of due process in connection
 6 with disciplinary proceedings. Pretrial detainees have a substantive due process right
 7 against restrictions that amount to punishment for criminal offenses. *Valdez v.*
 8 *Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002) (citing *United States v. Salerno*, 481
 9 U.S. 739, 746 (1987)); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Redman v. County of*
 10 *San Diego*, 942 F.2d 1435, 1440-41 (9th Cir. 1991) (*en banc*)). This right is violated if
 11 restrictions are "imposed for the purpose of punishment." *Bell*, 441 U.S. at 535. For
 12 particular governmental action to constitute punishment, the action must cause the
 13 detainee to suffer some harm or disability, and the purpose of the action must be to
 14 punish the detainee. *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) (citing *Bell*,
 15 441 U.S. at 538). But jail officials are entitled to impose restrictions to effect
 16 confinement, and detention will necessarily affect a detainee's ability to live as
 17 comfortably as he might like; a *de minimis* level of imposition is permissible.⁵ *Bell*, 441

19 ⁵ Thus:

20 Not every disability imposed during pretrial detention amounts to
 21 "punishment" in the constitutional sense, however. Once the Government
 22 has exercised its conceded authority to detain a person pending trial, it
 23 obviously is entitled to employ devices that are calculated to effectuate this
 24 detention. Traditionally, this has meant confinement in a facility which, no
 25 matter how modern or how antiquated, results in restricting the movement
 26 of a detainee in a manner in which he would not be restricted if he simply
 27 were free to walk the streets pending trial. Whether it be called a jail, a
 28 prison, or a custodial center, the purpose of the facility is to detain. Loss of
 freedom of choice and privacy are inherent incidents of confinement in
 such a facility. And the fact that such detention interferes with the
 detainee's understandable desire to live as comfortably as possible and with
 as little restraint as possible during confinement does not convert the
 conditions or restrictions of detention into "punishment."

1 U.S. at 539 n.21. There is no constitutional infringement, however, if restrictions are
 2 "but an incident of some other legitimate government purpose." *Id.* In such a
 3 circumstance, governmental restrictions are permissible. *Salerno*, 481 U.S. at 747.

4 Plaintiff alleges that after he requested assignment to PS based upon threats
 5 against him, he was denied PS based on his history. Bailey instead raised Plaintiff's
 6 classification to CC, which resulted in Plaintiff being housed separately from other
 7 inmates, which reduced the possibility of an assault on Plaintiff by other inmates.
 8 Plaintiff fails to allege facts to show that he was assigned to CC as punishment, rather
 9 than for legitimate detention purposes: Plaintiff's allegations reflect that he was placed in
 10 CC for his protection. While privileges for inmates held in CC were fewer than they
 11 would have been if he were eligible for placement in PS elsewhere, that did not convert
 12 his placement in CC into punishment. Accordingly, Plaintiff fails to state a claim against
 13 Bailey based on his placement in CC.

14 Plaintiff also alleges that he was charged with a disciplinary infraction for fighting
 15 stemming from the February 11, 2013 incident, which Plaintiff contends was merely self-
 16 defense. Plaintiff fails to allege whether or how he was sanctioned as a result of the
 17 disciplinary action. Plaintiff does not allege any change in the conditions to which he
 18 was already subject by virtue of his placement in the CC pod for his safety, nor does he
 19 allege that any such sanction rose to the level of punishment for the criminal offenses
 20 with which he was charged. Even if he had, Plaintiff fails to allege facts to support that
 21 he was denied any procedural protection prior to being found guilty of fighting. For these
 22 reasons, Plaintiff fails to state a claim for denial of due process based on his placement in
 23 CC or based on the subsequent disciplinary charge.

24 Plaintiff also appears to be attempting to assert a claim for denial of
 25 constitutionally adequate conditions of confinement and violation of equal protection
 26 where PS inmates at the Fourth Avenue Jail were treated differently and had fewer
 27 privileges than PS inmates at the LBJ Jail. A pretrial detainee's claim for

Bell, 441 U.S. at 537.

1 unconstitutional conditions of confinement arises under the Fourteenth Amendment Due
 2 Process Clause rather than the Eighth Amendment's prohibition against cruel and unusual
 3 punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 and n.16 (1979). Nevertheless, the same
 4 standards are applied, requiring proof that the defendant acted with deliberate
 5 indifference. *See Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

6 To state a claim for unconstitutional conditions of confinement, a plaintiff must
 7 allege that a defendant's acts or omissions have deprived the inmate of "the minimal
 8 civilized measure of life's necessities" and that the defendant acted with deliberate
 9 indifference to an excessive risk to inmate health or safety. *Allen v. Sakai*, 48 F.3d 1082,
 10 1087 (9th Cir. 1994) (citing *Farmer*, 511 U.S. at 834); *see Estate of Ford v. Ramirez-*
 11 *Palmer*, 301 F.3d 1043, 1049-50 (9th Cir. 2002). That is, a plaintiff must allege a
 12 constitutional deprivation that is objectively "sufficiently serious" to result in the denial
 13 of "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834.
 14 Whether conditions of confinement rise to the level of a constitutional violation may
 15 depend, in part, on the duration of an inmate's exposure to those conditions. *Keenan v.*
 16 *Hall*, 83 F.3d 1083, 1089, 1091 (9th Cir. 1996) (citing *Hutto v. Finney*, 437 U.S. 678,
 17 686-87 (1978)).

18 A plaintiff must also allege facts supporting that the jail official had a "sufficiently
 19 culpable state of mind," i.e., that the official acted with deliberate indifference to inmate
 20 health or safety. *Farmer*, 511 U.S. at 834. Deliberate indifference is a higher standard
 21 than negligence or lack of ordinary due care for the prisoner's safety. *Id.* at 835. In
 22 defining "deliberate indifference," the Supreme Court has imposed a subjective test, "the
 23 official must both be aware of the facts from which the inference could be drawn that a
 24 substantial risk of serious harm exists, *and* he must also draw the inference." *Id.* at 837.
 25 "'The circumstances, nature, and duration of a deprivation . . . must be considered in
 26 determining whether a constitutional violation has occurred.'" *Hearns v. Terhune*, 413,
 27 F.3d 1036, 1042 (9th Cir. 2005) (quoting *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir.
 28 2000)).

1 Plaintiff alleges that he was held in a cell alone, was allowed to leave his cell for
 2 an hour each day to shower, clean his cell, make telephone calls and the like. He
 3 complains that mentally ill inmates sometimes defecated or urinated in the hallways and
 4 that it took days for staff to clean the hallways. Plaintiff does not allege how frequently
 5 such issues arose, nor does he allege that he brought the issue to the attention of any jail
 6 staff-member and that staff-member's response. Plaintiff also complains of the noise
 7 caused by mentally ill inmates, but he does not describe the frequency or duration of such
 8 noise. Assuming such conditions rose to the level of being unconstitutional, Plaintiff
 9 fails to allege facts to support that any named Defendant knew that such conditions posed
 10 an excessive risk to Plaintiff and that such Defendant nevertheless failed to act to
 11 alleviate the problem. Plaintiff thus fails to state a claim for unconstitutional conditions
 12 of confinement against any Defendant.

13 Plaintiff contends that PS inmates at the Fourth Avenue Jail were treated
 14 differently than PS inmates at the LBJ Jail, where PS inmates were afforded more
 15 privileges. Generally, “[t]o state a claim . . . for a violation of the Equal Protection
 16 Clause . . . [,] a plaintiff must show that the defendants acted with an intent or purpose to
 17 discriminate against the plaintiff based upon membership in a protected class.” *Barren v.*
 18 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiff has not alleged he is a
 19 member of a protected class.

20 The United States Supreme Court has also recognized “successful equal protection
 21 claims brought by a ‘class of one,’ where the plaintiff alleges that [he] has been
 22 intentionally treated differently from others similarly situated and that there is no rational
 23 basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562,
 24 564 (2000); *see also SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d
 25 662, 679 (9th Cir. 2002). Plaintiff fails to state a claim under this standard. He does not
 26 allege facts to support that he was treated differently than other similarly-situated
 27 individuals or that there was no rational basis for treating him differently. Plaintiff
 28 acknowledges that other PS pretrial detainees were held in CC pods under analogous

1 conditions to his own. He does not allege that other PS inmates with histories similar to
 2 his own were nevertheless held at LBJ, nor does he allege that other PS inmates in CC
 3 pods were afforded more privileges than Plaintiff. Plaintiff's allegations also reflect a
 4 rational basis for not placing him in PS at the LBJ facility, i.e., Plaintiff's history and
 5 potential threat posed if he were held at LBJ. Thus, Plaintiff also fails to state an equal
 6 protection claim.

7 **IV. Leave to Amend**

8 For the foregoing reasons, Plaintiff's First Amended Complaint will be dismissed
 9 for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff
 10 may submit a second amended complaint to cure the deficiencies outlined above. The
 11 Clerk of Court will mail Plaintiff a court-approved form to use for filing a second
 12 amended complaint. If Plaintiff fails to use the court-approved form, the Court may
 13 strike the second amended complaint and dismiss this action without further notice to
 14 Plaintiff.

15 Plaintiff must clearly designate on the face of the document that it is the "Second
 16 Amended Complaint." The second amended complaint must be retyped or rewritten in
 17 its entirety on the court-approved form and may not incorporate any part of the original
 18 Complaint or First Amended Complaint by reference. Plaintiff may include only one
 19 claim per count.

20 A second amended complaint supersedes the original Complaint and First
 21 Amended Complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal*
Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990). After
 23 amendment, the Court will treat the original Complaint and First Amended Complaint as
 24 nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised in the
 25 original complaint or first amended complaint and that was voluntarily dismissed or was
 26 dismissed without prejudice is waived if it is not alleged in a second amended complaint.
Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

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1 **V. Warnings**

2 **A. Release**

3 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his
 4 release. Also, within 30 days of his release, he must either (1) notify the Court that he
 5 intends to pay the balance or (2) show good cause, in writing, why he cannot. Failure to
 6 comply may result in dismissal of this action.

7 **B. Address Changes**

8 Plaintiff must file and serve a notice of a change of address in accordance with
 9 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
 10 for other relief with a notice of change of address. Failure to comply may result in
 11 dismissal of this action.

12 **C. Copies**

13 Plaintiff must submit an additional copy of every filing for use by the Court. *See*
 14 LRCiv 5.4. Failure to comply may result in the filing being stricken without further
 15 notice to Plaintiff.

16 **D. Possible “Strike”**

17 Because the First Amended Complaint has been dismissed for failure to state a
 18 claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies
 19 identified in this Order, the dismissal may count as a “strike” under the “3-strikes”
 20 provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring
 21 a civil action or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the
 22 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
 23 brought an action or appeal in a court of the United States that was dismissed on the
 24 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
 25 granted, unless the prisoner is under imminent danger of serious physical injury.” 28
 26 U.S.C. § 1915(g).

27 **E. Possible Dismissal**

28 If Plaintiff fails to timely comply with every provision of this Order, including

1 these warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963
2 F.2d at 1260-61 (a district court may dismiss an action for failure to comply with any
3 order of the Court).

4 **IT IS ORDERED:**

5 (1) The First Amended Complaint (Doc. 14) is **dismissed** for failure to state a
6 claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended
7 complaint in compliance with this Order.

8 (2) If Plaintiff fails to file a second amended complaint within 30 days, the
9 Clerk of Court must, without further notice, enter a judgment of dismissal of this action
10 with prejudice that states that the dismissal may count as a “strike” under 28 U.S.C.
11 § 1915(g).

12 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a
13 civil rights complaint by a prisoner.

14 **Dated** this 8th day of July, 2014.

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17 
Honorable Diane J. Hurnetewa
United States District Judge

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**Instructions for a Prisoner Filing a Civil Rights Complaint
in the United States District Court for the District of Arizona**

1. **Who May Use This Form.** The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.
2. **The Form.** **Local Rule of Civil Procedure (LRCiv) 3.4(a) provides that complaints by incarcerated persons must be filed on the court-approved form.** The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.
3. **Your Signature.** You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. **The Filing and Administrative Fees.** The total fees for this action are \$400.00 (\$350.00 filing fee plus \$50.00 administrative fee). If you are unable to immediately pay the fees, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.
5. **Original and Judge’s Copy.** You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.
6. **Where to File.** You should file your complaint in the division **where you were confined when your rights were allegedly violated.** See LRCiv 5.1(a) and 77.1(a). If you were confined in Maricopa, Pinal, Yuma, La Paz, or Gila County, file in the Phoenix Division. If you were confined in Apache, Navajo, Coconino, Mohave, or Yavapai County, file in the Prescott Division. If you were confined in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file in the Tucson Division. **Mail the original and one copy of the complaint with the \$400 filing and administrative fees or the application to proceed *in forma pauperis* to:**

Phoenix & Prescott Divisions:

U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:

U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. **Change of Address.** You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. **Certificate of Service.** You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

9. **Amended Complaint.** If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. LRCiv 15.1. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. LRCiv 15.1(a)(2). **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

10. **Exhibits.** You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

11. **Letters and Motions.** It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.
2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.
3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for federal defendants; or “other.” If you mark “other,” identify the source of that authority.
2. Location. Identify the institution and city where the alleged violation of your rights occurred.
3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. **Counts.** You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**
2. **Issue Involved.** Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked "Other," you must identify the specific issue involved.
3. **Supporting Facts.** After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.
4. **Injury.** State precisely how you were injured by the alleged violation of your rights.
5. **Administrative Remedies.** You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
 - 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
 - 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
 - Other: _____.
2. Institution/city where violation occurred: _____.

B. DEFENDANTS

1. Name of first Defendant: _____ . The first Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)
2. Name of second Defendant: _____ . The second Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)
3. Name of third Defendant: _____ . The third Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)
4. Name of fourth Defendant: _____ . The fourth Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? Yes No
2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

D. CAUSE OF ACTION

COUNT I

1. State the constitutional or other federal civil right that was violated: _____

2. **Count I.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. Supporting Facts. State as briefly as possible the FACTS supporting Count I. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

5. Administrative Remedies:

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No

b. Did you submit a request for administrative relief on Count I? Yes No

c. Did you appeal your request for relief on Count I to the highest level? Yes No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____

COUNT II

1. State the constitutional or other federal civil right that was violated: _____
_____.
_____.

2. **Count II.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count II. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

5. Administrative Remedies.

- a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
- b. Did you submit a request for administrative relief on Count II? Yes No
- c. Did you appeal your request for relief on Count II to the highest level? Yes No
- d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not.

COUNT III

1. State the constitutional or other federal civil right that was violated: _____
_____.
_____.

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count III. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

5. Administrative Remedies.

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No

b. Did you submit a request for administrative relief on Count III? Yes No

c. Did you appeal your request for relief on Count III to the highest level? Yes No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.